No. 10035

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF.

F. C. LESLIE and
NEWLIN & ASHBURN,
1020 Edison Building, Los Angeles,
Attorneys for Appellant.

F. C. LESLIE,
RAY J. COLEMAN,
HUDSON B. COX,
Of Counsel.

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In the maze of legal issues involved in this appeal there is a tendency to lose sight of the basic equity underlying appellant's cause; the Government has collected from the taxpayer, retains and has not refunded taxes of $51,098.47. Of that amount $34,648.08 was paid as a tax upon an inventory stock of processed cotton under the Agricultural Adjustment Act [Finding IX, Tr. p. 144]. No portion of that amount has been refunded or credited to appellant or to appellant's predecessor in interest, Pacific Goodrich Rubber Company [Finding IX, Tr. p. 144], although no dispute exists as to the illegality of that exaction. (*United States v. Butler*, 297 U. S. 1; 80 L. Ed. 477; Supplemental

Brief of Appellee p. 3.) The balance of the amount, to wit, $16,450.39, represents a tax with interest thereon computed upon the weight of the same processed cotton which was demanded and collected under the Manufacturer's Excise Tax (Sec. 602, Revenue Act of 1932; 26 U. S. C. A. Sec. 3400). This additional manufacturer's excise tax, the recovery of which alone is sought in this action, was found by the trial court to have been "erroneously, illegally and unjustly demanded and collected" [Conclusion II. Tr. p. 154]. If the Sovereign Government is subject to the same fundamental principles of equity and fair dealing which govern the transactions of individuals,[1] good cause and persuasive cause must be shown by the Government why it should not refund its illegal exaction.

With this basic thought held firmly in mind, let us examine the reasons advanced by the Government for its refusal to make this refund.

I.

The Unconstitutionality of the Agricultural Adjustment Act Is but an Added Reason Why a Refund Should Be Made in This Case.

As a ground of denial, not relied upon by the Commissioner of Internal Revenue in denying the claims for refund [Ex. H-1, H-2 and H-3, Tr. pp. 221-225; Finding XX, Tr. p. 150], advanced for the first time in the trial court and by it summarily dismissed [Opinion, Tr. pp. 100-101; Conclusion IV, Tr. p. 154], abandoned by the

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[1] *McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115, 116, "With few exceptions growing out of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter."

Government in its brief on appeal[2] and resurrected by it on oral argument, the Government urges in effect that because the processing taxes it exacted were illegal the protection granted by Congress in the proviso clause of Section 9 (a) of the Agricultural Adjustment Act against double taxation of the same commodity was unavailing; that hence it may retain both the illegally collected processing taxes and the additional manufacturer's excise tax. Such an argument makes up certainly in ingenuity what it lacks in moral considerations.

Apart from its glaring inequities, this argument of counsel might be troublesome were it not for the weakness of the two pillars upon which it rests. It assumes that the doctrine of *Norton v. Shelby County*, 118 U. S. 425, is still the untrammelled, unquestionable law of the realm, and it assumes that Congress, in exempting from double taxation commodities upon which a processing tax had been paid, intended to exempt such commodities only if the processing tax was *validly* collected.

Considering the latter assumption first: the proviso clause of Section 9 (a) of the Agricultural Adjustment Act, upon which the taxpayer relied for its right to deduct from the weight of the tires it sold the weight of processed cotton contained therein on which it had paid a tax under Section 16 of the Agricultural Adjustment Act, had for its very obvious and manifest purpose the protection of the taxpayer from subjection to a double tax under two separate laws upon the weight of the same commodity (see Appellant's Reply Brief, Point IV, pp.

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[2]"Counsel did not deem the question of sufficient importance to discuss it in his brief, and we do not consider it of sufficient moment to depart from the general rule that such assignments will not be considered." *Lee Tung v. United States* (9th C. C. A.), 7 Fed. (2d) 111, 112.

17-26). So apparent is this intent that it cannot well be gainsaid.

The strength or weakness, therefore, of counsel's assumption must rest in the answer to the question: Would Congress, had it known that its levy of processing taxes were to be held invalid, have provided, as in fact it did, that those persons who *paid* the processing tax should not be subjected to another levy upon the same commodity under a different Federal revenue statute? Government counsel, to suit their own purpose, blithely assume that it would not and they read into the provision words which are not there, namely, that the relief from the double tax was made dependent upon a *valid* collection of the processing tax. A moment's consideration shows that the very obvious intent of Congress would be doubly defeated if such contention be sound. The right to apply the particular method of computing the manufacturer's sales tax allowed by the proviso clause in Section 9 (a) was made dependent upon the *fact of payment* of the processing tax on the cotton contained in the subject article. If that levy has been paid (and no dispute exists here that it has been paid and has not been refunded; [see Finding IX, Tr. p. 144], then the article, said Congress in effect, should be freed from the additional tax on the weight of the same processed cotton under the other act. If this was the end sought to be achieved, what matters it that at some later date the courts have held the levy of the processing tax to be invalid? If it has been collected in fact and not refunded, the same discrimination and the same double taxation on the same commodity would be present whether the Agricultural Adjustment Act tax was validly or improperly collected.

Indeed, with the notable exception of the Government's attitude in the instant case, the administrative agencies of the United States have paid silent tribute to the very point we now urge. Although, other than by judicial knowledge, not a matter of record in this case because it is not susceptible of evidentiary proof, the Commissioner of Internal Revenue has made no effort, subsequent to *Butler v. United States,* so far as can be ascertained from the decisions and from the rulings and regulations of the Treasury Department, to assess additional manufacturer's excise taxes against those manufacturers who paid a processing tax on the weight of their cotton under the Agricultural Adjustment Act and took the benefit of the proviso clause of Section 9 (a). Clearly, if counsel's contentions be sound, the Commissioner has been remiss in his duties in not seeking to assess an additional manufacturer's excise tax upon the ground that the right to the credit taken was invalidated by the effect of the *Butler* decision and notwithstanding that another and larger levy upon the same commodity made under the Agricultural Adjustment Act was improperly collected and retained.

An Unconstitutional Statute Is Not a Nullity From the Beginning and for All Purposes.

The essence of counsel's whole argument upon this point rests upon what has come to be known as the "*ab initio*" theory of an unconstitutional law advanced by Mr. Justice Field in *Norton v. Shelby County,* 118 U. S. 425, 30 L. Ed. 178, 186, holding in effect that an unconstitutional law is no law, that it confers no rights and imposes no duties and is as inoperative as though it had never been passed. This doctrine of constitutional law, were it ever

such, has become, however, considerably outmoded as witness the language of Mr. Chief Justice Hughes in *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U. S. 371, 374; 84 L. Ed. 329, 332:

> "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."

The same argument made by opposing counsel here was advanced by the taxpayer in *Anniston Mfg. Co. v. Davis, Collector,* before the Fifth Circuit Court of Appeals, 87 Fed. (2d) 773; affirmed later in 301 U. S. 337; 81 L. Ed. 1143. There the taxpayer sought to recover processing taxes from the Collector to whom they were paid, without proceeding in the manner required by Sections 902, *et seq.,* of the Revenue Act of 1936, which prescribed the procedure to be followed in seeking refunds of amounts collected under the Agricultural Adjustment Act. The taxpayer urged that under the doctrine of *Norton v. Shelby County,* the Collector had collected the taxes in question under an unconstitutional law that was in effect no law and that he was therefore a trespasser *ab initio,* without legal protection or authority [p. 779]. Adverting to the expression

of Mr. Justice Field in *Norton's* case quoted by appellee at Supplemental Brief page 3, the court stated at page 779:

> "But, like every other like phrase coined arguendo in the process of decision, this phrase leaves something to be desired, when it is lifted from its argumentative setting to be converted into a general legal canon on, indeed, into almost a part of, the Constitution itself. When it is attempted, as here, to be given such wide application as not merely to strike down an exaction so that it cannot thereafter be collected, but to support a common-law action against a collector for moneys collected and paid into the Treasury by him under color of the law, and as a part of his official duties before the law was declared unconstitutional, it is well to call attention to exactly what was decided in that case, and to the fact that there is abundant authority to the contrary of the position appellants take."

We invite the court's attention further to the very able discussion of the *Norton* case and to the subject of the effect of an unconstitutional statute contained on page 780 of that report.

J. A. Dougherty's Sons v. Commissioner of Internal Revenue (3rd C. C. A.), 121 Fed. (2d) 700, is pertinent. There the taxpayer, subject to a Pennsylvania floor tax on liquors, accrued certain sums on its books to pay the tax. Before payment was made the State Floor Tax was held unconstitutional and the taxes never were paid. The taxpayer contended that before the act was declared unconstitutional it was entitled to deduct the accrued taxes from gross income or, in the alternative, not being free to distribute the accruals to its stockholders it should be credited with these accruals against its liability for undis-

tributed profits tax. The Commissioner urged, as does counsel here, that the Pennsylvania Liquor Floor Tax having been declared unconstitutional was in effect never a law and removed the accruals from the category of "taxes accrued" as contemplated by the Revenue Acts. In reversing the Board of Tax Appeals, the court said at page 702:

> "Although it was *formerly* held that an unconstitutional statute is a nullity *ab initio* (see Norton v. Shelby County, 118 U. S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178, and Chicago, Indianapolis & Louisville Railway Co. v. Hackett, 228 U. S. 559, 566, 33 S. Ct. 581, 57 L. Ed. 966), *more lately* it has been recognized that the consequences of action taken or restricted in obedience to the requirements of a statute which subsequently is declared unconstitutional are to be appraised and adjudged in the light of the compulsion exerted by the statute prior to its determined invalidity."

and after quoting from the *Chicot County* case, *supra,* concluded:

> "It is our opinion that, notwithstanding the later determined unconstitutionality of the Pennsylvania Floor Tax Act, the tax levies made pursuant thereto for the years 1935, 1936 and 1937 imposed upon the taxpayer a liability for each of the years in question which it was its duty to pay or accrue within the respective taxable years."

and

> "* * * that the accruals for Pennsylvania floor taxes made by the taxpayer in the years 1935, 1936 and 1937 were proper when made and, as such, were deductible from gross income in the respective taxable years under Sec. 23 (c) of the Revenue Acts of 1934 and 1936."

In *Phipps v. School District* (3rd C. C. A.), 111 Fed. (2d) 393, plaintiff sought to enjoin a levy of local taxes because of the unconstitutionality of the statute under which they were levied. Seeking to avoid the effect of Section 24 (1) of the Judicial Code which forbids the Federal District Courts jurisdiction to enjoin collection of a tax imposed by state law plaintiff urged that the act being unconstitutional there never was, in fact, any law pursuant to which the subject taxes were sought to be levied. Said the court in affirming a judgment of dismissal, page 395:

> "Accepting the unconstitutionality of the Act of 1929, as determined by the Supreme Court of the state, it was none the less the statute under which the school district acted when it levied its taxes for the years 1937 and 1938. * * * The determination of unconstitutionality did not make of the act a blank page in retrospect, as the appellants urge. Under it, actions had been taken by the school district, as the bill discloses, which were operative facts that must be recognized, at least, so far as the question whether the board acted by or pursuant to a law of the state is concerned."

See, also:

Field, "The Effect of an Unconstitutional Statute," p. 91.

The right to deduct from the weight of tires sold the weight of the cotton therein on which a tax had been paid under the Agricultural Adjustment Act, as accorded by the proviso clause of Section 9 (a), was a right which accrued and vested in the taxpayer when it paid its

processing[3] taxes, a right given by the Act and not expressly or impliedly struck down by the decision in the *Butler* case. The right accrued and was exercised [see Exhibit C, Tr. p. 197: Exhibits 1 and 2, Tr. pp. 236-238, and the Claims for Refund, Exhibits D and F, Tr. pp. 199 and 209] prior to the determination of the unconstitutionality of the tax-levying features of the Agricultural Adjustment Act (January 6, 1936) and under the authorities above cited and quoted the right to rely thereon was not struck down with the later adjudged invalidity of the taxing provisions of the statute.

That the decision in *United States v. Butler, supra,* had the effect of invalidating only those portions of the Agricultural Adjustment Act which sought to levy processing and so-called compensating taxes is evidenced by the opinion of this court in *Edwards v. United States,* 91 Fed. (2d) 767, 789, and by the enactment in 1937 of the Agricultural Marketing Agreement Act where, under Section 5 thereof, Congress expressly provided:

> "No processing taxes or compensating taxes shall be levied or collected under sections 601 to 624 of this title, as amended. *Except as provided in the preceding sentence, nothing in this chapter shall be construed as affecting provisions of sections 601 to 624 of this title, as amended,* * * *." (50 Stat. 249; 7 U. S. C. A. Sec. 673.)

The sections mentioned: "601 to 624 of this title," refer, of course, to the Agricultural Adjustment Act and include Section 9 (a) (§609 (a) of 7 U. S. C. A.) of which the proviso clause is a part.

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[3]We use the term in the general sense as inclusive of the tax under Sec. 16. See Point III *infra.*

If, then, the expressed intention of Congress to grant relief from double taxation to and to avoid discrimination among those taxpayers who were subject to both processing taxes and excise taxes upon the same commodity is not to be ignored, effect must be given to the express mandate of the statute which in Section 14 thereof (7 U. S. C. A. Sec. 614) declares:

> "If any provision of this chapter is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this chapter and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby."[4]

and that portion of the statute which provided a specific method for the computation of manufacturer's excise taxes where the Agricultural Adjustment Act levy had been paid and collected must be preserved as Congress declared and must have intended it should be.

THE EQUITABLE PRINCIPLES INHERENT IN AN ACTION FOR MONEY HAD AND RECEIVED GOVERN APPELLANT'S RIGHT OF RECOVERY HEREIN.

The trial court concluded [Conclusion II, Tr. p. 154] that the right to the refund of this additional Manufacturer's Excise Tax which was "erroneously, illegally and unjustly demanded and collected" [Tr. p. 154] vested in the taxpayer under the equitable remedy of money had and received or, as stated by Mr. Chief Justice Hughes

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[4]"When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration." Per Mr. Chief Justice Hughes in *Electric Bond & Share Company v. Securities and Exchange Comm.*, 303 U. S. 419, 434, 82 L. Ed. 936, 944.

in *Anniston Mfg. Co. v. Davis,* 301 U. S. 337, 350; 81 L. Ed. 1143, 1152:

> "* * * the statutes providing for refunds proceed on the same equitable principles that underlie an action in assumpsit for money had and received. *That action 'aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bona belongs to the plaintiff.'* "

Examining, then, "the abstract justice of the case," it is apparent that the Government has collected $34,648.08 from the taxpayer as an invalid levy under the Agricultural Adjustment Act; through a misconstruction, as the trial court found, of the proviso clause of Section 9 (a)[5] the Government further erroneously demanded and collected an additional excise tax of $16,450.38 on the weight of the same processed cotton. Surely "the abstract justice of the case" will not permit appellee to assert the invalidity of one levy as a defense to a refund of the other. See *Bull v. United States,* 295 U. S. 247, 260; 79 L. Ed. 1421, 1427; *Stone v. White,* 301 U. S. 532, 534; 81 L. Ed. 1265, 1269.

If, in the words of Mr. Chief Justice Hughes, we look "solely to the inquiry, whether the defendant holds money which *ex aequo et bono* belongs to the plaintiff," the Government's improper collection of the Agricultural Adjustment Act tax will not be permitted to stand as a defense to it in refusing refund of another improper levy. Even as to the sovereign, two wrongs will not make a right.

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[5]In holding that it had no application to taxes collected under Section 16 of the Agricultural Adjustment Act.

The injustice inherent in counsel's argument is well illustrated by the analogy of *Bull v. United States, supra.* It was there observed that the peculiar expediencies of government necessitated the reversal of ordinary processes of law in the collection of taxes; that it is only after the assessment and collection of the tax that the taxpayer can seek redress for unjust administrative action in the form of a proceeding for refund and restitution. "But", as Mr. Justice Roberts remarked, "these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign" (p. 260 of 295 U. S.; 79 L. Ed. at p. 1427). If, therefore, instead of the additional excise tax having been assessed and paid, the United States had had to maintain an action therefor, assuredly the taxpayer could have urged in defense thereof either that under the statute it was entitled to the deduction computation granted by the proviso clause of Section 9 (a) or, in the alternative, that it should be credited with the processing tax improperly collected from it under an unconstitutional statute. The same grounds it would then have had in defense of the action by the Government to collect the tax are available to it now in its action for refund. To paraphrase Mr. Justice Roberts' opinion:

> "It is immaterial that * * * owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his demand for credit of the amount which if the United States had sued him for excise tax he could have recouped against his liability on that score." (See p. 263 of 295 U. S.)

In short the true test of counsel's contention lies in the supposition that the Government instead of defending against the action for refund is here seeking to collect this additional excise tax upon the ground that the declared unconstitutionality of the taxing provisions of the A. A. A. carried with it the taxpayer's right to rely upon the exemption provisions contained in the proviso clause of Section 9 (a). Had such been the state of facts and had the court adhered to the now outmoded doctrine of Norton's case and had further held the proviso clause of Section 9 (a) not to be severable and had decided the issue in favor of the Government, certainly the taxpayer under the authority of *Bull v. United States, supra,* could have offset against the recovery the illegal exaction collected from it under the Agricultural Adjustment Act. Compare *United States v. MacDaniel,* 7 Pet. 1, 16-17, 8 L. Ed. 587, 592-593; *United States v. Rinagold,* 8 Pet. 150. 163-164; 8 L. Ed. 899, 904. Such being the case appellant should be placed in no worse a position because in the field of taxation the normal processes of law are reversed. If the Government could not have recovered in the one instance it cannot employ the same grounds to defeat recovery here.

APPELLANT HAS FOLLOWED THE PROPER AND THE ONLY REMEDY FOR THE RECOVERY OF THIS ERRONEOUSLY ASSESSED EXCISE TAX.

Counsel for the Government states that appellant has misconceived its remedy; that it should have sought recovery of the unconstitutional Agricultural Adjustment Act Taxes which the taxpayer paid in 1933, aggregating $34,648.08 (Supplemental Brief p. 5). The objection begs the issue entirely. The additional tax recovery of which we are here seeking was admittedly assessed, de-

manded and paid as a Manufacturer's Excise Tax [Ex. C, Tr. p. 197; Conclusions II and IV, Tr. pp. 154-155]: it has been so treated by the Government throughout and as such could never have been recovered under the procedure prescribed for the recovery of Agricultural Adjustment Act taxes. Appellant therefore has pursued its sole remedy for the recovery of the tax in question and certainly it is not for the Government to complain that it has sought the recovery of an excise tax which it was erroneously compelled to pay rather than seeking the refund of another levy illegally made and collected under the Agricultural Adjustment Act.[6]

II.

The Record Adequately Shows That the Tax Was Neither Included in the Price of the Tires nor Collected From the Vendees.

It was urged at the time of oral argument that appellant had not met the burden of proof which Section 621 (d) of the Revenue Act of 1932 imposes as a condition to securing a refund because, although the record sufficiently showed that the additional tax was not included in the price of the tires sold, it was not in so many words testified that the taxpayer had not collected the amount of tax from the vendee.

We contend, however, that the testimony upon this point, which took the form of a stipulation as to what the witness George Hubbell would testify and which appears at pages 90 to 92 of the record is adequate to meet

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[6]Of course, the time has now long since expired for appellant to file claim or prosecute an action for the refund of this tax. Secs. 903, 904, Int. Rev. Act of 1936; 7 U. S. C. A., Secs. 645, 646.

the requirements of the statute. This testimony, the court will recall, was found to be true and formed the basis of the trial court's Finding XXII [Tr. pp. 151-152]. In essence it was that the taxpayer, throughout the period from August 1, 1933 (the date when the cotton processing tax first went into effect) to April 10, 1934 (the date when the additional excise tax was first demanded) was *informed* and *believed* that for the purpose of computing its Manufacturer's Excise Tax it was entitled under the provisions of Section 9 (a) of the Agricultural Adjustment Act to deduct from the weight of tires sold the weight of the processed cotton contained therein on which a tax had been paid under either Section 9 (a) or Section 16 of the Agricultural Adjustment Act; that at no time during the period preceding April 10, 1934, did taxpayer or appellant *contemplate* that they, or either of them, would be called upon to pay an additional tax of 2¼ cents per pound on the weight of processed cotton on which a tax of approximately 4½ cents per pound had already been paid under the Agricultural Adjustment Act; that taxpayer did not include in the price of the tires so sold by it any amount to cover any excise tax upon the processed cotton contained therein; that it sold said tires at the same price as those which contained cotton on which a processing tax under Section 9 (a) as opposed to the equivalent "inventory" tax under Section 16 had been paid;[7] that it was not until long after

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[7]Note that tires containing cotton on which a *processing* tax as such had been paid were clearly exempted by the proviso clause in question from the excise tax upon the weight of the same cotton. If, therefore, the tires here in question, containing cotton on hand on August 1, 1933, and upon which an inventory or floor tax under Section 16 had been paid, were sold at the same price, manifestly the additional excise tax subsequently demanded and paid thereon could not have been included and passed on to the purchasers.

the tires in question had been sold and billed that the additional tax was proposed, and that thereafter no additional amount was billed or collected from the purchasers of the tires [Tr. pp. 90-92].

Unless counsel for the Government can prevail upon the court to indulge two unwarranted assumptions, the foregoing testimony, uncontradicted and found by the trial court to be true, proves conclusively that this additional tax was neither included in the price of the tires sold nor collected from the purchasers thereof. To find otherwise, the court would have to assume, first, that the taxpayer passed on, separately and *as a tax*, to its vendees a levy which it was *informed* and *believed* it was not called upon to pay, which was, in fact, not *in contemplation* by it at the time, and, second, that if the additional tax was in fact separately billed and collected from the purchasers of the tires, that counsel for appellant and, indeed counsel for the Government,[8] were guilty of unethical and, indeed, sharp practice in seeking to mislead the court by the use of subtle ambiguities and innuendo.

Cases cited by us in our Opening Brief (O. B. pp. 38-42), and to our knowledge there are none to the contrary, establish that the burden of proving that a particular tax has not been passed on must necessarily be sustained by proof that the liability for the particular tax was neither known nor in contemplation by the taxpayer when the taxable articles were sold by him.

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[8]The testimony was the subject of a signed stipulation between the attorneys for both parties.

See:

Campana Corporation v. Harrison (7th C. C. A.), 114 Fed. (2d) 400 (O. B. pp. 38-39);

Skinner v. United States (D. C. Ohio), 8 Fed. Supp. 999 (O. B. pp. 39-40);

Con-Rod Exchange, Inc. v. Hendricksen (D. C. Wash.), 28 Fed. Supp. 924 (O. B. pp. 40-41);

Einson-Freeman Co. v. Corwin, Collector (D. C. N. Y.), 29 Fed. Supp. 98 (O. B. p. 41);

University Distributing Co. v. United States (D. C. Mass.), 22 Fed. Supp. 794 (O. B. p. 42).

As was observed in *United States v. Cheek* (6th C. C. A.), 126 Fed. (2d) 1, 3:

> "Where the evidence contradicts any real relationship between tax and price increases, that is, *indicates that the floor stock tax was never, in any sense, a factor in determining the sales prices of the various articles,* the burden of the statute has been adequately met. Hutzler Bros. Co. v. United States, D. C. Md., 33 F. Supp. 801; * * *."

In brief, we urge simply that the evidence was sufficient to satisfy the conditions precedent of Section 621 (d) because it established (a) that the tax was not included in the price of the tires sold and (b) by necessary hypothesis the amount of the additional tax could not have been collected from the taxpayer's vendees *as tax* because at the time the tires were sold the taxpayer, as found by the court [Tr. pp. 151-152] and established by the evidence [Tr. pp. 90-92], was *informed* and *believed* that it was not liable for the extra tax and did not have it in contemplation.

In fact for the taxpayer to have attempted to collect this additional excise tax from its vendees when it was informed and believed that no liability for the tax existed would have been a crime under the Revenue Laws of the United States[9] and criminal guilt will never be presumed.

The only meaning, therefore, of which the stipulated evidence is susceptible is that neither appellant nor the taxpayer included the additional tax in the price of the articles with respect to which it was imposed and that they did not collect the amount thereof from the vendees.

Corroborative of the stipulated testimony of the witness George Hubbell was the verified Amended Claim for Refund of the taxpayer filed with the Collector at Los Angeles and received in evidence as appellant's Exhibit E. Therein it was stated under oath:

> "The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. *Neither did it collect the amount of said tax from the persons to whom the articles in question were sold.*" [Tr. p. 206].

The same asseveration was made in the Amended Claim for Refund made by appellant. [Exhibit G, Tr. p. 217].

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[9]Sec. 1132, Revenue Act of 1926; 26 U. S. C. A., Sec. 3325:

"Whoever in connection with the sale or lease, or offer for sale or lease, of any article, or for the purpose of making such sale or lease, makes any statement, written or oral, (1) intended or calculated to lead any person to believe that any part of the price at which such article is sold or leased, or offered for sale or lease, consists of a tax imposed under the authority of the United States, or (2) ascribing a particular part of such price to a tax imposed under the authority of the United States, knowing that such statement is false * * * shall be guilty of a misdemeanor * * *."

In his affidavit in support of appellant's motion to reopen, the witness George Hubbell further stated under oath that the original books and records of the taxpayer would corroborate in all respects the stipulated testimony of the affiant and

> "from which it can be shown and will appear and upon the basis of which he can and will testify that the tax (the refund of which is sought in the above entitled action) *was not passed on* to the vendees of said corporation; * * *." [Tr. p. 130].

III.

The Proviso Clause of Section 9(a) of the Agricultural Adjustment Act Had Application Alike to Taxes Levied Under Section 16 as Well as Taxes Levied Under Section 9(a).

Strictly, the only meritorious defense presented by the Government in its opposition to the refund of this additional manufacturer's sales tax is its contention that the proviso clause of Section 9 (a) by its terms purports to allow a deduction from the taxable weight of commodities containing cotton only where a *processing* tax has been paid thereon and that the unnamed levy made under Section 16 does not fall within the statutory definition of "processing tax."

This point has been covered by us at pages 17 to 26 of Appellant's Reply Brief and little more need be said thereon other than that a reading of Sections 9 (a), 15 (e), 16 and 17 of Title I of the Agricultural Adjustment Act (7 U. S. C. A. §§ 609 (a), 615 (e), 616 and 617) con-

vincingly show that the various tax levies provided for were all of them identical in amount with, were measured by, and were effective simultaneously with the tax "upon the first domestic processing" as defined in Section 9 (a), and that in employing the term "processing tax" in the statute, Congress used the words generically as inclusive of all the levies made under the Act. Certainly to restrict the words "processing tax" in the proviso clause of Section 9 (a) as urged by Government counsel would contravene the very manifest intent sought to be achieved by Congress in the enactment of the proviso and would result in both unjust discrimination between manufacturers of the same class and impose double taxation upon the weight of the same processed cotton, an intent to do which will never be presumed. (*Maas v. Higgins*, 312 U. S. 443, 449, 85 L. Ed. 940, 945.)

But assume, *argumenti gratia,* that the literal use of the term "processing tax" is, in fact, so restricted by definition that it cannot be said to include the undefined, equivalent and counterpart levy made upon inventories on hand under Section 16 of the Agricultural Adjustment Act. The manifest purpose of the proviso clause is so apparent, the intent to relieve against double taxation upon the weight of the same processed cotton so clear, and the discrimination that would result from the inclusion of processing taxes and the exclusion of the identical tax on inventories so real that it becomes the duty of the court to construe the clause so as to give effect to the purpose of the statute, "*sacrificing, if necessary, the literal meaning*

in order that the purpose may not fail'" (*Ozawa v. United States,* 260 U. S. 178, 194, 67 L. Ed. 199, 207).

Compare *Helvering v. Stockholms Enskilda Bank,* 293 U. S. 84, 79 L. Ed. 211, wherein it was said that the fact that the word "obligations" had been given a particular and narrower construction in one part of the Internal Revenue Act of 1926 could not deter the court from giving it a broader and more general meaning in another part of the Act where the intent of Congress would be thereby subserved (p. 89):

> "If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail."

The *Anniston Manufacturing Company* case, cited by counsel at Supplemental Brief page 11, did not involve in any sense an interpretation of the proviso clause nor, indeed, of any portion of the Agricultural Adjustment Act, but concerned itself solely with the adequacies of the remedies for refund prescribed by Congress under Title VII of the Revenue Act of 1936. That a later Congress, after the Act had been declared unconstitutional provided somewhat different modes of procedure for the recovery of processing taxes and floor stocks taxes argues nothing for or against the meaning of the term "processing taxes" as employed by the 73rd Congress in the proviso clause of Section 9 (a) of the Agricultural Adjustment Act.

Conclusion.

Other points raised by Government counsel, either in oral argument or in their Supplemental Brief, have, we believe, been fully covered in Appellant's Opening and Reply Briefs, particularly the assertion of an alleged variance between the claims for refund and the grounds urged for recovery at the trial (see Reply Brief, Point III, pp. 12-16). As to the effect of the Government's stipulation for the filing of the amended complaint wherein the alleged "new grounds" of recovery were first presented, see *Snead, Collector v. Elmore* (5th C. C. A.), 59 Fed. (2d) 312 at 313.

The reference made in the footnote at page 5 of the Government's Supplemental Brief to Section 2074, Revised Code of Delaware, 1935, is fully answered by the following authorities:

Rev. Code of Delaware, Section 2075;

Arn v. Bradshaw Oil & Gas Co. (5th C. C. A.), 93 Fed. (2d) 728, 731;

Stearns Coal etc. Co. v. Van Winkle (6th C. C. A.), 221 Fed. 590, 596;

Gardiner v. Automatic Arms Co. (D. C. N. Y.), 275 Fed. 697, 701.

In conclusion, and at the risk of reiteration, we desire to present once again the question upon the answer to which this action is to be judged: "Does defendant hold moneys which *ex aequo et bono* belong to plaintiff?" The defendant has collected under protest of the taxpayer and

under compulsion of statute $51,098.47, $34,648.08 of which by admission of counsel was an illegal exaction under an unconstitutional statute and the balance of which, the subject of this action, was the result of an erroneous construction of the proviso clause of Section 9 (a). We earnestly believe that we have met and satisfied every condition and requirement for the refund of this tax. Has the Government shown good and sufficient cause why it should be permitted to retain the wrongful exaction? The answer to that question, we believe, necessitates a reversal of the judgment below.

Respectfully submitted,

F. C. Leslie and

Newlin & Ashburn,

Attorneys for Appellant.

F. C. Leslie,

Ray J. Coleman,

Hudson B. Cox,

Of Counsel.